No. 10-535

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RH CAPITOL ASSOCIATES LLC and
PACIFIC INVESTMENT MANAGEMENT
COMPANY LLC,

Petitioners,

v.

MAYER BROWN LLP and JOSEPH P. COLLINS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
REPLY BRIEF FOR PETITIONERS	1
1. The Second Circuit's Decision Conflicts With Other Courts of Appeals Regarding Whether Attribution is Necessary in Order to "Make" a Statement	1
2. The Second Circuit's Decision Conflicts With Other Circuits Regarding the Element of Reliance	3
3. The Second Circuit's Holding Conflicts with This Court's Decision in *Stoneridge*	6
4. This Case Should Be Held Pending the Court's Determination in *Janus*	7
5. Strong Policy Reasons Favor Granting the Petition	10
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

CASES

Anixter v. Home-Stake Production Co.,
77 F.3d 1215 (10th Cir. 1996) 5

Central Bank, N.A. v.
First Interstate Bank, N.A.,
511 U.S. 164 (1994) 6, 7, 11, 12

City of Monroe Employees Ret. Sys. v.
Bridgestone Corp.,
399 F.3d 651 (6th Cir. 2005) 4

Foman v. Davis,
371 U.S. 178 (1962) 10

In re Mutual Funds Investment Litigation,
566 F.3d 111 (4th Cir. 2009), *cert. granted*
sub nom. Janus Capital Group, Inc. v. First
Derivative Traders, No. 09-525) 3, 4, 5, 10

In re Software Toolworks,
50 F.3d 615 (9th Cir. 1994) 2, 5

In re Tronox, Inc.,
No. 09-cv-6220 (SAS), 2010 U.S. Dist.
LEXIS 67664 (S.D.N.Y. June 28, 2010) 4

Janus Capital Group, Inc. v.
First Derivative Traders,
No. 09-525 ..... 1, 7, 8, 10

Cited Authorities

Page

Lattanzio v. Deloitte & Touche LLP,
476 F.3d 147 (2d Cir. 2007) 2, 3

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000) 5-6

Pension Benefit Guaranty Corporation v. LTV Corp.,
496 U.S. 633 (1990) 12

SEC v. Wolfson,
539 F.3d 1249 (10th Cir. 2008) 5

Shapiro v. Cantor,
123 F.3d 717 (2d Cir. 1997) 1, 2

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 6, 7, 9

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 11

FEDERAL STATUTES AND RULES

15 U.S.C. § 78j(b) 1, 3, 7, 11

17 C.F.R. § 240.10b-5 ..... *passim*

Fed. R. Civ. P. 15(a) 10

REPLY BRIEF FOR PETITIONERS

1. The Second Circuit's Decision Conflicts With Other Courts of Appeals Regarding Whether Attribution is Necessary in Order to "Make" a Statement

Without disputing that there is a split among the Courts of Appeals as to what it means to "make" a statement for Rule 10b-5 purposes, or even that the Second Circuit requires attribution before an actor may be deemed to have "made" a statement, Respondents instead argue that the Second Circuit's attribution requirement *in this case* only involved the reliance element of a Rule 10b-5 claim. This is incorrect.[1]

Quoting its prior caselaw, the Second Circuit repeatedly confirmed that its attribution requirement was due in part to the Circuit's belief that one has not "made" a statement for Rule 10b-5 purposes if the statement is not attributed to that actor at the time of dissemination. *See, e.g.*, App. 14a ("If *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting...." (quoting *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997)); App. 18a-

1. Respondents apparently find significance in the fact that the petition for rehearing en banc was denied "without recorded dissent." BIO 8. The petition for rehearing en banc was filed on May 10, 2010, and held for over two months before it was denied on July 23, 2010 – shortly *after* this Court granted certiorari in *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 on June 28, 2010.

19a (liability requires an "articulated statement" by the defendant, which in turn requires attribution (quoting *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007)); App. 20a ("To be cognizable, a plaintiff's claim against a secondary actor must be based on that actor's own 'articulated statement,' or on statements made by another that have been explicitly adopted by the secondary actor.").[2] Previous decisions by the Second Circuit had similarly stressed that Rule 10b-5 liability could not be imposed on a defendant who did not "actually make" a statement. *Shapiro*, 123 F.3d at 720.

The Second Circuit also repeatedly rejected the standard employed by the Ninth Circuit in *In re Software Toolworks*, 50 F.3d 615 (9th Cir. 1994), App. 16a, 22a-23a — a decision that Respondents themselves acknowledge concerned the definition of "make" under Rule 10b-5, BIO 14. As Respondents explain in their opposition brief, the Ninth Circuit employs a "substantial participation standard" to determine whether a defendant has "made" a statement within the meaning of Rule 10b-5, BIO 14; in the decision below, the Second Circuit explicitly held that the Ninth Circuit's "substantial participation" test was incompatible with its own bright line rule requiring explicit attribution. App. 22a-23a.

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2. Such statements by the Second Circuit adopted the arguments made by Respondents in their brief to that court. *See, e.g.*, Brief for Defendants-Appellees in 09-1619-cv (2d Cir.) ("Although the word 'make' may mean 'create' in other contexts, everyone knows that 'to make a statement' is not the same thing as to 'create' on by drafting it for use by someone else.'").

Moreover, had the Second Circuit's decision been based solely on reliance, there would have been no need for it to require *explicit* attribution; it would have held that the reliance element is satisfied so long as the public is aware of the statement's true drafter (the approach taken by the Fourth Circuit in *In re Mutual Funds Investment Litigation*, 566 F.3d 111, 124 (4th Cir. 2009), *cert. granted sub nom. Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525). Instead of allowing public knowledge to serve as a substitute for attribution, however, the Second Circuit held that "public's understanding that a secondary actor 'is at work behind the scenes' [is] alone insufficient." App. 20a (quoting *Lattanzio*, 476 F.3d at 155).

Respondents contend that the fact that the Second Circuit limited its holding to private actions demonstrates that court only intended to engage the reliance element of a Rule 10b-5 claim, which is unique to private claims. BIO 10-11. However, that reservation cannot trump the clear language of the opinion; if anything, this reservation merely demonstrates the Circuit's own unease regarding the implications of its holding on Section 10(b) liability, and represents a further reason why certiorari is warranted.

2. The Second Circuit's Decision Conflicts With Other Circuits Regarding the Element of Reliance

Respondents contend that the Second Circuit's requirement of explicit attribution to satisfy the element of reliance does not conflict with the decisions of any other Court of Appeals. In so doing, Respondents focus

on the *facts* of the different cases rather than on their legal reasoning.

First and most obviously, the decision below conflicts with *Mutual Funds*. The Fourth Circuit announced that the reliance element would be satisfied so long as the investing public is aware of the statement's drafter, 566 F.3d at 124, while the Second Circuit rejected this rule in favor of an explicit contemporaneous attribution requirement, App. 20a. Although Respondents emphasize that the Fourth Circuit focused on the precise relationship between the issuer and the behind-the-scenes drafter, BIO 13, the court did so for the purpose of determining whether its test had been satisfied, i.e., whether the public was aware of the drafter's identity, 566 F.3d at 126. The Fourth Circuit did not purport to hold that it would only impose liability on that precise set of facts.

The Sixth Circuit's decision in *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005), is also at odds with the Second Circuit's decision. Respondents stress that *Bridgestone* involved related corporations, BIO 13-14, but nothing in the Second Circuit's definition of "secondary actor" – to which its attribution rule explicitly applies, App. 3a n.1 — excludes related corporations. To the contrary, since the decision was issued, the Second Circuit's attribution rule has been applied to dismiss claims against a parent corporation for statements issued by its subsidiary. *See In re Tronox, Inc.*, No. 09-cv-6220 (SAS), 2010 U.S. Dist. LEXIS 67664 (S.D.N.Y. June 28, 2010).

Respondents next contend that *Software Toolworks* involved only the question of what it means to make a statement, and did not involve the question of reliance; however, the Ninth Circuit allowed plaintiffs to proceed with their claims despite the lack of attribution. *See* 50 F.3d at 629. The court thus demonstrated that it did not believe that explicit attribution was necessary to satisfy any of the elements of a private Rule 10b-5 action, including reliance. *See Mutual Funds*, 566 F.3d at 123 ("The Ninth Circuit, in contrast, has concluded that public attribution is not required to plead reliance.").

As for the Tenth Circuit, that court articulated its standard for private liability in *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215 (10th Cir. 1996), holding that "[t]he critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff." *Id.* at 1225. Subsequently, the court explicitly held that this standard does not impose a requirement of attribution. *See SEC v. Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008). Thus, once again, the Tenth Circuit made it clear that it does not require explicit attribution to satisfy the element of reliance.

What is particularly noteworthy about the Second Circuit's decision, moreover, is its apparent view that the standard for liability changes depending on the status of the actor. The Second Circuit's decision applies only to "secondary actors," and thus, presumably, would not require explicit attribution if the issuing corporation funneled false information to the market through a conduit. *See, e.g.*, *Novak v. Kasaks*, 216 F.3d 300, 314

(2d Cir. 2000). However, the Fourth, Sixth, Ninth, and Tenth Circuits have all adopted standards for liability that are based solely on the defendant's *conduct*, without regard for the "status" of the actor.

3. The Second Circuit's Holding Conflicts with This Court's Decision in *Stoneridge*

Respondents contend that the Second Circuit's holding was in accord with *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) because their conduct was not revealed to the market. BIO 15. As Petitioners previously explained, however, at least one aspect of their conduct – their words – was disclosed directly to the market and, Petitioners allege, relied upon by investors. Pet. 24. Respondents' position, which would require disclosure of sham transactions before liability could be imposed, is paradoxical, as even the Second Circuit acknowledged, App. 30a: Since disclosure itself would reveal the fraud, such a requirement would simply be the equivalent of holding that no actor but the issuing corporation can be liable for deceptive conduct – a position that stands in direct contradiction to this Court's holdings in both *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191 (1994) and *Stoneridge*, 552 U.S. at 166.

There is also no relevance to Respondents' argument that outside counsel, unlike corporate employees, are not "agents" for all purposes. BIO 17. As Respondents do not dispute, they functioned as Refco's authorized agents for all of the actions that form the basis of Petitioners' claims. Respondents have cited

no authority to suggest that their actions, as Refco's authorized agents, were in any way distinguishable from the actions of Refco itself or its numerous employee-agents. It is precisely because Respondents acted *on Refco's behalf* that their conduct made it "necessary or inevitable" that Refco would misreport its financial condition, *Stoneridge*, 552 U.S. at 161; and it is this distinction that makes Respondents' actions categorically different from those of the vendors who engaged in arms'-length business dealings with the primary actor in *Stoneridge*.

Moreover, contrary to Respondents' argument, this Court has *not* "carefully drawn [a] line between primary actors and secondary actors." BIO 17. To the contrary, this Court has made it clear that liability is based on *conduct*, and the degree and manner in which that conduct harmed investors. *See Central Bank*, 511 U.S. at 177-78; *Stoneridge*, 552 U.S. at 160. Nothing in the text of either Section 10(b) or Rule 10b-5 states that liability will be imposed based on the *status* of the actor, and, as Petitioners previously explained, status-based liability would immunize a wide swath of fraudulent conduct that is designed and effectuated by persons other than the issuing corporation. Pet. 27.

4. This Case Should Be Held Pending the Court's Determination in *Janus*

The questions presented in *Janus* are: "(1) Whether a service provider can be held primarily liable in a private securities-fraud action for 'help[ing]' or 'participating in' another company's misstatements. (2) Whether a service provider can be held primarily liable

in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider?" Respondents do not dispute that at least the second question is squarely presented in this case. Instead, they argue that because the *Janus* plaintiffs claim that the defendant in that case is not actually a service provider, this Court's holding in *Janus*, even if it favors the plaintiffs, will necessarily diverge from the questions on which it granted certiorari and therefore will have no relevance to this case. BIO 18-19.

There is no basis for this conclusion. This Court is not bound by the plaintiffs' characterization of the relationship between the Janus entities, nor is this Court required to fashion a ruling specific only to those facts. Moreover, both the plaintiffs and the Solicitor General in *Janus* have explicitly argued that attribution is not necessary for imposition of liability on *any* defendant. Resp. Br. at 48-51; *see also id.* at 15-16 (urging adoption of the "creator" standard rejected by the Second Circuit); Gov't Br. at 26-27.

Respondents also argue that *Janus* will not have any effect on the petition because the Second Circuit would likely dismiss the complaint on the alternative ground that it is insufficiently particularized to demonstrate either that Respondents' drafted false statements on Refco's behalf, or that the market was aware of Respondents' role in drafting. BIO 20-21. Respondents' speculation as to how the Second Circuit might rule on alternative issues is not grounds for determining that *Janus* could have no effect on the outcome of this case.

First, Respondents are simply wrong to argue that the complaint does not sufficiently allege that they drafted false statements. To the contrary, both the Second Circuit and the District Court explicitly held that Petitioners had so alleged. App. 6a ("Collins and another Mayer Brown attorney also personally drafted" false sections of the Offering Memorandum); App. 30a n.7 (refusing to allow the fact that Respondents "allegedly drafted" false disclosures alter its *Stoneridge* analysis); App. 45a ("The portions of the memorandum drafted by the Mayer Brown Defendants included the Management's Discussion & Analysis ... and Risk Factors portion"); App. 51a-52a ("In Count Nine of their Complaint, plaintiffs allege that the Mayer Brown Defendants violated § 10(b) and Rule 10b-5(b) when they drafted, reviewed, and revised portions of the Offering Memorandum and the IPO Registration Statement"). The mere fact that the SEC, in its amicus brief, did not explicitly weigh in on the subject is not proof that the complaint is inadequate: It is hardly surprising that the SEC – concerned only with the substantive standards for primary liability in the absence of attribution – did not take a position on the completely distinct issue as to whether Petitioners' 329-page complaint (which, at the time the SEC filed its brief, was subject to a court order of confidentiality) contains sufficiently particularized allegations to meet the pleading standards of the PSLRA.

As for Respondents' claim that the complaint fails to demonstrate that the market was aware of their involvement in the drafting of the documents, the Second Circuit did not rule on this argument. Petitioners alleged that Joseph Collins's long-term

relationship with Refco was so well-known that he was publicly identified as the "go-to guy at Refco" in press reports, and that Mayer Brown was explicitly identified as Refco's counsel in the Offering Memorandum and the IPO Registration Statement. Notably, as counsel for Janus flatly stated in oral argument, "Lawyers write prospectuses." Tr. of Oral Argument at 12, *Janus*, *supra*. Under these facts, there is every reason to believe that, at least for pleading purposes, the market was aware of Respondents' involvement in drafting; at the very least, should this Court adopt a standard similar to that employed by the Fourth Circuit in *Mutual Funds*, the Second Circuit should be given the opportunity in the first instance to determine how the standard applies to the facts of this case.

Finally, even if the complaint is insufficiently particularized, Respondents should at least be given the opportunity to amend to meet whatever standard this Court adopts in *Janus*. "The court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a); *see Foman v. Davis*, 371 U.S. 178, 182 (1962).[3]

5. Strong Policy Reasons Favor Granting the Petition

Respondents argue that the Second Circuit's rule would not immunize fraudulent conduct from the reach of the securities laws because the SEC and the

3. Although the Second Circuit denied Respondents' request to amend, it did so based on its view that under its explicit attribution standard, any amendment would be futile. App. 33a.

Department of Justice would still be able to bring enforcement actions. BIO 21. However, as has been repeatedly acknowledged by this Court, government enforcement efforts alone are not sufficient to adequately protect the securities markets. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (characterizing private litigation as "an indispensable tool with which defrauded investors can recover their losses" and thus "a matter crucial to the integrity of domestic capital markets"). This case provides a perfect example: Despite actions by both the Department of Justice and the SEC against Joseph Collins, not a single penny has been recovered from Collins or Mayer Brown for the benefit of investors.

Respondents similarly claim that Second Circuit's decision does not implicate situations involving parent and subsidiary corporations, or anonymous speakers. BIO 21-22. However, the Second Circuit defined "secondary actors" to mean anyone other than the issuing corporation and its employees, and did not articulate any exceptions. App. 3a n.1.

Finally, the mere fact that Congress did not adopt an amendment permitting a private right of action for aiding and abetting does not establish either that the Second Circuit's interpretation of Section 10(b) and Rule 10b-5 are correct, or that the issue is unworthy of review. Indeed, this Court rejected a similar argument in *Central Bank*, when it held that Congress's failure to enact bills that would explicitly permit aiding and abetting liability did not indicate, one way or another, the proper interpretation of Section 10(b). As this Court put it, "failed legislative proposals are 'a particularly

dangerous ground on which to rest an interpretation of a prior statute.'" *Id.* at 187 (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

CONCLUSION

With respect to Respondents' remaining arguments, Petitioners stand on the contents of their petition. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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